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Supreme Court of the United States

October Term, 1969

No. 533

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,
Petitioner,

v.

JAMES LEE JONES,
Respondent.

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,
Petitioner,

v.

WILLIAM IPOCK,
Respondent.

Petition for a Writ of Certiorari to the Judgment of the United States Court of Appeals for the Fourth Circuit

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PRELIMINARY STATEMENT

The Superintendent of the Virginia State Penitentiary, J. D. Cox, Jr., prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on June 2, 1969. The mandate was recalled and stayed upon application of the Superintendent. C. C. Peyton, the named Petitioner herein, is now deceased. He was formerly the Superintendent of the Virginia State Penitentiary.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit will be found as Appendix I. of this brief.

THE JUDGMENT

On June 2, 1969, the United States Court of Appeals for the Fourth Circuit rendered a judgment granting the writs of habeas corpus applied for by the Respondents herein. On July 1, 1969, an order was entered recalling and staying the mandate to the District Court in order to allow the Superintendent of the Virginia State Penitentiary to seek a writ of certiorari from this Court.

JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari in this case is grounded upon 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

I.

Did The United States Court Of Appeals For The Fourth Circuit Err In Holding That Probable Cause For An Arrest Did Not Exist?

STATUTES INVOLVED

§§19.1-20, 19.1-21 & 19.1-22, Code of Virginia 1950, as amended:

> 19.1-20. Who are conservators of the peace; powers and duties.—Every judge throughout the State and every justice of the peace, commissioner in chancery, and county surveyor while in the performance of the duties of his office within his county or corporation shall be a conservator of the peace, and may require from persons not of good fame security for their good

behavior for a term not exceeding one year. Every conservator of the peace shall arrest without a warrant for felonies committed in his presence, or upon reasonable suspicion of felony, and for breaches of the peace and all misdemeanors of whatever character committed in his presence.

19.1-21. Their duty, on complaint that a crime is intended; warrant.—If complaint be made to any such conservator that there is good cause to fear that a person intends to commit an offense against the person or property of another, he shall examine on oath the complainant, and any witness who may be produced, reduce the complaint to writing, and cause it to be signed by the complainant; and if it appear proper, such conservator shall issue a warrant, reciting the complaint, and requiring the person complained of forthwith to be apprehended and brought before him or some other conservator.

19.1-22. The proceeding when accused appears.—When such person appears, if the conservator, on hearing the parties, considers that there is not good cause for the complaint, he shall discharge such person, and may give judgment in his favor against the complainant for his costs. If he considers that there is good (cause) therefor, he may require a recognizance be given, he shall commit him to jail by a warrant, stating the sum and time in and for which the recognizance is directed. The person given judgment under this section for costs may issue a writ of fieri facias thereon, if an appeal be not allowed, and proceedings thereupon may be according to §§ 16.1-99 through 16.1-101.

STATEMENT OF THE CASE

On February 28, 1967, the Respondents herein were convicted for the crime of breaking and entering. They had been tried in the Hustings Court, City of Richmond, Part II. Prior to their convictions, the Respondents were arrested by officers of the Police Department, City of

Richmond, Virginia, under the circumstances described below.

The underlying facts are virtually undisputed. At approximately 6:30 p.m. on October 29, 1966, Detectives Boyer and Bernhard of the Richmond police force saw the Respondents and another man walking in an area of Richmond which had recently been the scene of a number of burglaries. The officers testified that they were in an unmarked police car when they saw the two Respondents and their companion proceeding north on Bainbridge Street. The detectives pulled into the parking lot of a Safeway store from which point they hoped to observe the three again. The store was open for business at the time. From the parking lot Boyer and Bernhard saw the appellants emerge from an alley and enter a car parked on the Safeway lot in which a fourth person was waiting. When this vehicle immediately departed from the lot, the officers followed.

It has been admitted that the officers then had no intention and no reason to arrest the occupants. After following for about 30 minutes, they lost the car in traffic. One of the officers claimed that during this surveillance the car drove through three or four gas stations without stopping; however, this testimony was somewhat contradicted by the other officer who stated the driver stopped in the stations but made no purchases. There is no evidence that the Respondents or their comrades knew they were being followed. Having lost sight of the vehicle, Boyer and Bernhard issued an all-unit broadcast, in which they said they wanted the men picked up for investigation only, not for arrest.

The next contact between the Richmond police and the Respondents was almost five hours later, shortly before midnight. Detective H. L. Coleman, who had been assigned to the area which had been victimized by a series of burg-

laries, observed three men walking together who he thought answered the descriptions furnished in the all-unit broadcast by Officers Boyer and Bernhard. Coleman approached and briefly questioned them, asking their names and the reason for their presence there. Jones was unable to furnish identification satisfactory to Coleman, and Ipock and the other person apprehended gave Coleman names which were later determined to be false, but the falsity he did not then know. Receiving what he termed "conflicting stories" in answer to his questions, Coleman told the Respondents he was arresting them for night prowling.

At the suppression hearing Coleman admitted that the three men were walking on the sidewalk in orderly fashion, not making loud noises or otherwise drawing attention to themselves. He further testified that the street was well-lighted and that a number of establishments in the area were open for business. After the arrests, Coleman called Boyer and Bernhard to the scene by radio, and they identified the arrested persons as three of the four seen earlier in the evening.

The police then searched the petitioners and seized some cash, a jacket and a penknife. The incriminating nature of these articles was discovered later. The State does not dispute the fact that the police were unaware of the occurrence of the burglary which became the basis of the prosecutions until the day following the arrests. As already noted, after the arrests for night-prowling and the searches, the prowling charges were not pressed by the authorities.

ARGUMENT

The only issue which Petitioner presents for consideration is whether probable cause existed for the arrest of the Respondents which resulted in a search and seizure of evidence later used to convict them.

It is important to note here that the only judge who has actually had the benefit of hearing live testimony and the observation of the demeanor of the witnesses is the state trial judge. The appeals to the Supreme Court of Appeals of Virginia were rejected. No state habeas corpus proceedings were conducted because the same questions raised on appeal in the state court were raised in Federal habeas corpus actions. Therefore, exhaustion of state remedies was accomplished.

The Federal District Court did not conduct any plenary hearings and decided the case on the record. Of course, the Federal Appellate Court had only the benefit of the record during its consideration of the case. Therefore, of all judges ruling on this case, only the state trial judge had a real "feel" for the oral evidence as presented. Mr. Justice Harlan, in his dissenting opinion in *Beck* v. *Ohio*, 379 U.S. 89, 13 L.Ed. 2nd 142, 85 S.Ct. 223, made the following comment which is pertinent to this discussion:

> "A distinction between facts and inferences may often be difficult to draw, but the guiding principle for this Court should be that when a question is in doubt and demeanor and credibility of witnesses, or contemporaneous understandings of the parties, have a part to play in its resolution, this Court should be extremely slow to upset a state court's inferential findings. The impetus for our exercising de novo review of the facts comes from the attitude that unless this Court can fully redetermine the facts of each case for itself, it will be unable to afford complete protection for constitutional rights. But when the 'feel' of the trial may have been a proper element in resolving an issue which is unclear on the record, our independent judgment should give way to the greater * capability of the state trial court in determining whether a constitutionaol right has been infringed.

> Proper regard for the duality of the American judicial system demands no less. * (378 U.S. 101)"

Probable cause has to be determined on each independent factual circumstance. The demeanor and credibility of witnesses are of the utmost importance in ascertaining the truth in these matters.

The state trial judge after hearing testimony and observing the witnesses, determined that the police officers involved had sufficient facts to support further investigation into the activities of the Respondents. The reading of the cold record is not nearly so illuminating as the actual reaction to witnesses which the trial judge must have.

These Respondents were arrested in the warehouse district of South Richmond in Virginia. The area had been subjected to a rash of break-ins and extra police had been dispatched to cover the area. It was after dark and these men were seen skulking in the alleys along which some of these warehouses were situated. Although they ultimately entered an automobile parked in a Safeway Stores lot which was open, there was no evidence whatever that they had any business in the alley nor had they been in the grocery store. The police officers who spotted these men attempted to follow the Respondents' car, but lost it in traffic. As a result, they put out an all points bulletin asking that the men be stopped and questioned. Descriptions of the men and the car were broadcast. Five hours later the Respondents were arrested after being recognized. They failed to satisfy the arresting officer when they gave evasive and erroneous answers to proper questions. They were arrested and later searched. Evidence was seized which was later used to convict them.

The arresting officer certainly had a duty to stop these Respondents inasmuch as he had to comply with the orders

transmitted on the all points bulletin. His knowledge is attributable to, and is the same as, that of the officers making the request. *Commonwealth* v. *Brown,* 237 N.E. 2nd 53 (1968). Those officers making the request had reasonably concluded in the light of their experience that criminal activity might be afoot and should be investigated. Police officers should be allowed to rely on their experience and intuition when attempting to discharge their duties, particularly when it comes to crime prevention as opposed to the investigation of crimes already committed. This Court has commented favorably on this point in its decision in *Terry* v. *Ohio,* 392 U.S. 1, 20 L.Ed. 2nd 889, 907, 88 S.Ct. 1868.

The fact that these men were in a place in which they aroused the suspicions of the officers, and then refused to cooperate with the officers later on inquiry certainly is enough to require an experienced police officer to look into the matter further. He would be neglectful of his duty if he failed to. To hamper the use of what he develops by the proper discharge of his duty, is to tell a police officer not to make the effort. It is important to achieve the proper balance between the protection of the individual right and the protection of the ability of the government to serve the people as a whole. The good which can be accomplished by sustaining this action must be balanced against the risk of abuse which would place too onerous a burden on the citizenry.

Had these individuals not been prowling the alleys in the location in which they were, they would not have incurred the suspicion of the officers. What other person, with honest intentions, would have been there under these conditions. There was no reason for them to be there, and they did not appear to be up to any good. This is the information

that was passed on to the arresting officer. It is Petitioner's belief that sufficient probable cause existed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ of certiorari should be granted, and the portion of the judgment finding no probable cause in this case be reversed.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

RENO S. HARP, III
Assistant Attorney General of Virginia

W. LUKE WITT
Assistant Attorney General of Virginia

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, W. Luke Witt, an Assistant Attorney General of Virginia, counsel for the Superintendent in the captioned matter, and a member of the bar of the Supreme Court of the United States do hereby certify that on this 29th day of August, 1969, I mailed a copy of the foregoing Petition for a Writ of Certiorari to the Judgment of the United States Court of Appeals for the Fourth Circuit by first class mail to John D. Johnston, Jr., Counsel for Respondents, % New York University School of Law, New York, New York.

W. LUKE WITT
Assistant Attorney General

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Decided June 2, 1969

SOBELOFF, Circuit Judge:

Appellants William Ipock and James Lee Jones were arrested "for being of ill fame for being night-prowlers"[1] in the circumstances detailed below. Shortly after the arrests, they were searched by the police and evidence was

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[1] The pertinent sections of the Virginia statute are as follows:

19.1-20. Who are conservators of the peace; powers and duties.—Every judge throughout the State and every justice of the peace, commissioner in chancery, and county surveyor while in the performance of the duties of his office within his county or corporation shall be a conservator of the peace, and may require from persons not of good fame security for their good behavior for a term not exceeding one year. Every conservator of the peace shall arrest without a warrant for felonies committed in his presence, or upon reasonable suspicion of felony, and for breaches of the peace and all misdemeanors of whatever character committed in his presence.

19.1-21. Their duty, on complaint that a crime is intended; warrant.—If complaint be made to any such conservator that there is good cause to fear that a person intends to commit an offense against the person or property of another, he shall examine on oath the complaint, and any witness who may be produced, reduce the complaint to writing, and cause it to be signed by the complainant; and if it appear proper, such conservator shall issue a warrant, reciting the complaint, and requiring the person complained of forthwith to be apprehended and brought before him or some other conservator.

19.1-22. The proceeding when accused appears.—When such person appears, if the conservator, on hearing the parties, considers that there is not good cause for the complaint, he shall discharge such person, and may give judgment in his favor against the complainant for his costs. If he considers that there is good [cause] therefor, he may require a recognizance of the person against whom it is, and give judgment against him for the costs of the prosecution, or any part thereof; and, unless such recognizance be given, he shall commit him to jail by a warrant, stating the sum and time in and for which the recognizance is directed. The person given judgment under this section for costs may issue a writ of fieri facias thereon, if an appeal be not allowed, and proceedings thereupon may be according to §§ 16.1-99 through 16.1-101.

discovered incriminating them in a burglary the commission of which had not yet become known to the police. The ill fame or prowling charges were abandoned, but indictments for statutory burglary were returned. At their respective trials the inculpatory items were offered by the State and admitted over objection. Upon conviction they sought writs of error from the Supreme Court of Appeals of Virginia, which were denied.[2] They then instituted habeas corpus proceedings in the District Court,[3] each unsuccessfully contending that the warrantless search which produced the incriminating evidence was unreasonable because the antecedent arrest was unlawful.

Because the two appellants raise an identical point arising from the same events, their appeals have been consolidated. In each instance the challenge is to the legality of the arrest and is predicated upon two alternative grounds. The appellants' position is that the statute under which the arrests were made is void for vagueness, and further, that even if the statute is constitutionally valid the arrests were without probable cause. We agree with the latter contention and hold that writs of habeas corpus should issue.

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[2] Ipock is serving a six-year sentence imposed in the Hustings Court of the City of Richmond, Part II, on January 3, 1967. The writ of error was denied him on April 26, 1967. Both at trial and on appeal, Ipock challenged the legality of his arrest and the constitutionality of the subsequent search and seizure, and he therefore has exhausted his state remedies. Edmondson v. Warden, Maryland Penitentiary, 335 F.2d 608 (4 Cir. 1964); Grundler v. North Carolina, 283 F.2d 798 (4 Cir. 1960), *cert. denied*, 362 U.S. 917.

Jones was convicted in the same trial court on February 28, 1967 and received a sentence of seven years. He was denied a writ of error on October 10, 1967. He too raised the search and seizure issue and has exhausted his state court remedies.

[3] Ipock's petition was dismissed on March 6, 1968 by the District Court for the Eastern District of Virginia, at Alexandria, while Jones' petition was dismissed on January 29, 1968 by the District Court sitting in Richmond.

I

The underlying facts are virtually undisputed. At approximately 6:30 p.m. on October 29, 1966, Detectives Boyer and Bernhard of the Richmond police force saw the appellants and another man walking in an area of Richmond which had recently been the scene of a number of burglaries. The officers testified that they were in an unmarked police car when they saw the two appellants and their companion proceeding north on Bainbridge Street. The detectives pulled into the parking lot of a Safeway store from which point they hoped to observe the three again. The store was open for business at the time. From the parking lot Boyer and Bernhard saw the appellants emerge from an alley and enter a car parked on the Safeway lot in which a fourth person was waiting. When this vehicle immediately departed from the lot, the officers followed.

It has been admitted that the officers then had no intention and no reason to arrest the occupants. After following for about 30 minutes, they lost the car in traffic. One of the officers claimed that during this surveillance the car drove through three or four gas stations without stopping; however, this testimony was somewhat contradicted by the other officer who stated the driver stopped in the stations but made no purchases. There is no evidence that the appellants or their comrades knew they were being followed, and therefore this is not a case in which evidence of "flight" may become an element in assessing whether the police had probable cause for making arrests.[4] Having lost sight of the vehicle, Boyer and Bernhard issued an all-unit

[4] The District Court, in dismissing Ipock's petition found that the auto in which Ipock was a passenger "*eluded* the unmarked police car that was following them." The evidence adduced furnishes no basis for this finding, as the Assistant Attorney General of Virginia frankly conceded in argument of the appeal.

broadcast, in which they said they wanted the men picked up for investigation only, not for arrest.

The next contact between the Richmond police and the appellants was almost five hours later, shortly before midnight. Detective H. L. Coleman, who had been assigned to the area which had been victimized by a series of burglaries, observed three men walking together who he thought answered the descriptions furnished in the all-unit broadcast by Officers Boyer and Bernhard. Coleman approached and briefly questioned them, asking their names and the reason for their presence there. Jones was unable to furnish identification satisfactory to Coleman, and Ipock and the other person apprehended gave Coleman names which were later determined to be false, but the falsity he did not then know. Receiving what he termed "conflicting stories" in answer to his questions, Coleman told the appellants he was arresting them for night-prowling.

At the suppression hearing Coleman admitted that the three men were walking on the sidewalk in orderly fashion, not making loud noises or otherwise drawing attention to themselves. He further testified that the street was well-lighted and that a number of establishments in the area were open for business. After the arrests, Coleman called Boyer and Bernhard to the scene by radio, and they identified the arrested persons as three of the four seen earlier in the evening.

The police then searched the petitioners and seized some cash, a jacket and a penknife. The incriminating nature of these articles was discovered later. The State does not dispute the fact that the police were unaware of the occurrence of the burglary which became the basis of the prosecutions until the day following the arrests. As already noted, after the arrests for night-prowling and the searches, the prowling charges were not pressed by the authorities.

II

We consider first the appellants' argument that the ill fame or night-prowling statute is unconstitutionally vague. The statute authorizes the requirement of behavior bonds for a term of up to one year from "persons not of good fame."[5] If the phrase "not of good fame" was without judicial gloss, we would readily agree that the statute is impermissibly vague, because "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). See *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939). However, we have the benefit of a definitive construction of this statutory language by Virginia's highest court, whose construction must be accepted in assessing the validity of the statute. In *Fedele* v. *Commonwealth*, 205 Va. 551, 138 S.E.2d 256 (1964), the Supreme Court of Appeals of Virginia reviewed a trial court's adjudication that the defendant was a night prowler who could be required to post a behavior bond. We note in passing that the proceeding was not a criminal prosecution, and was characterized by the appellate court as "quasi-criminal." The judgment was reversed upon the view that the evidence was insufficient to support the charge. In so holding, the court defined the statute's reach:

> The phrase "ill fame," as defined in Black's Law Dictionary, 3d ed., at p. 916, means "evil repute; notorious bad character." "Fame" has been held to be

[5] It is doubtful whether an arrest without a warrant may be made under the statute. See §§ 19.1-21 and 19.1-22 quoted in fn. 1. However, our disposition of the case on other grounds makes it unnecessary to decide the point.

synonymous with "reputation." Harrison v. Lakenan, 189 Mo. 581, 88 S.W. 53, 58. Thus the phrase "ill fame," or "not of good fame," implies bad reputation.

The word "prowl," as defined in Webster's Third New International Dictionary, at p. 1828, means "to move about or wander stealthily * * * ; roam in search or as if in search of whatever may be found." A "prowler" is defined as "one who prowls." Thus it may be said that a "night prowler" is one whose habit is to move about at night for the purpose of committing some crime, or disturbing the peace, or doing some wrongful or wicked act.

In Mayo's Guide to Magistrates, 1892, (Flournoy & Brown edition) at p. 532, under Title II, "Surety for Good Behavior," the author said that before a justice should require a party to find sureties for his good behavior under Code § 3912 (now § 19.1-20) "where no actual breach of the peace has been committed or is apprehended, that he should be satisfied by evidence on oath, *not only that the individual is not of good fame or reputation, but that his conduct and actions have been so scandalous as to justify his interference.* (Emphasis supplied by the court.)

The Supreme Court of the United States declared in *Winters* v. *New York,* 333 U.S. 507, 514 (1948): "The interpretation by * * * [the Supreme Court of Appeals of Virginia] puts these words in the statute as definitely as if it had been so amended by the legislature."

The plain teaching of the Virginia Court in *Fedele* is that a person may not be required to post bond under § 19.1-20 merely because he has a "bad reputation." If this alone were to subject a person to possible penalty, the statute would unquestionably be unconstitutionally vague, for what is a "bad reputation" and from whose viewpoint is reputation to be judged? The difficulty these questions pose demonstrates the constitutional inadequacy of a statute penalizing "bad reputation" alone.

Fedele, however, expressly held that the statute comes into play only if it is shown that the accused is one whose "*habit* is to move about at night for the purpose of committing some crime, or disturbing the peace, or doing some wrongful or wicked act." (Emphasis supplied.) The word "habit" is defined in Webster's Unabridged Dictionary, 2d ed., as "a settled tendency of behavior." This is a rigorous standard, and we think use of this term by the Virginia court was deliberate and well advised. Recognizing the possibilities for abuse, the court interpreted the statute in a manner to preserve the rights of innocent persons who might fall within its scope if given an unduly broad application.

We assume for the purposes of this case that the court's narrow construction supplied requisite definiteness, gave fair warning of the activity in question and obviated the need for "men of common intelligence * * * [to] guess at its meaning," *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926), thus satisfying the demands of due process.[6]

III

Assuming the statute's validity, it still remains to be determined whether there was "probable cause" for the

[6] The decision in Commonwealth v. Franklin, 172 Pa. Super. 152, 92 A.2d 272 (1952), is not in conflict with our assumption on this point. In that case, the Superior Court of Pennsylvania ruled that the practice of requiring acquitted defendants to post behavior bonds under a "not of good fame" statute was a violation of due process. In the course of the opinion, the court considered the question of the vagueness of the phrase and concluded that it was impermissibly vague. As we have stated, this would be our view if the Virginia statute were to be tested on its face. See generally Amsterdam, "Federal Constitutional Restrictions on the Punishments of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like," 3 Crim. L. Bull. 205 (1967).

arrests. The inquiry in this regard is whether in the totality of the circumstances at the time of the arrests the police had reasonable ground to believe that the appellants were "not of good fame" and were "night-prowlers" within the restrictive definition of the *Fedele* court. Manifestly the facts known to the investigating officers furnished an utterly insufficient basis for such belief.

Nothing in the circumstances would support a reasonable inference that the appellants were in the *habit* of moving about with wrongful purpose. The collective knowledge of the investigating officers was merely that the men had been seen at two different times on the same evening in an area in which there had been a number of burglaries. On this basis alone, the appellants were stopped by Officer Coleman.[7] On questioning them, he was dissatisfied with Jones' identification. This, however, was insufficient to elevate the circumstances to the level of probable cause. The fact that Ipock gave a name later found to be false is immaterial on the probable cause issue. In sum, when the arrest was made the investigating officers had no more than the barest unsupported suspicion that the appellants had acted or were about to act unlawfully. The arrests were therefore illegal, and for this reason the subsequent searches were in violation of the Fourth and Fourteenth Amendments to the Constitution.

In light of developments after the arrests there is a temptation to look upon these appellants and say, "but it did turn out that they are thieves, so why not let the searches and the convictions stand?" The Constitution takes a longer view; it looks beyond the immediate gain and considers the baleful results that would follow in the trail of judicial validation of illegal searches only because they are

[7] We express no opinion on the constitutionality of the "stop." We assume, without deciding, that it was lawful.

productive. Justice Jackson's statement in *United States* v. *DiRe*, 332 U.S. 581, 595 (1948) that "a search is not to be made legal by what it turns up" has become a truism of the law.[8]

If the rule were otherwise, then in the pursuit of the guilty, many innocent persons would be subjected to grave harassment. A free country cannot afford to indulge the theory that the apprehension of the guilty by any means whatsoever is justified, for that is the path to tyranny. Doubtless more violators would be captured, but at the expense of vast intrusions upon the liberty and privacy of guiltless persons as well—an unacceptable price in a free society. The Supreme Court's most recent pronouncement in *Davis* v. *Mississippi*, 37 U.S.L.W. 4359 (U.S. 4/22/69), for example, is a plain reaffirmation of the established principle that summary arrests and searches on general suspicion, without warrants or probable cause, are intolerable even if in a particular instance such police behavior proves fruitful. The courts must with utmost firmness protect the constitutional rights of all, for if some are denied their rights today, others may be made to suffer the same deprivation tomorrow.

In accordance with our conclusion that unconstitutionally

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[8] The eloquent concluding paragraph of his opinion for the Court is worth repeating here:

> We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand. 332 U.S. at 595.

obtained evidence was introduced at the appellants' trials, we grant them writs of habeas corpus and order their release unless the Commonwealth elects to retry them within a reasonable time without the use of the tainted evidence.

Reversed and remanded with directions.